IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1769 OF 2006

Mr. Janardan B. Mhatre ...Appellant.

vs

Municipal Corporation of Gr.Bombay ...Respondents

Mr. Anil Singh, i/b. D.R. Shah, for the Appellant
Mr. J.J. Xavier, for the Respondent.

CORAM : A.S.OKA, J.
DATE : AUGUST 14, 2006.

P.C.:

1. Heard Advocates appearing for the parties.

Appellant is the Original Plaintiff.

2. Appellant filed suit for declaration that notice dated 12th January 1991 is illegal, invalid and null and void and order of demolition dated 21st January 1992 passed by the Respondent - Corporation was illegal. Suit filed by the Appellant has been dismissed by the Trial Court.

3. Notice dated 12th January 1991 was issued by the Respondent - Corporation to the Appellant under Section 351 of the Bombay Municipal Corporation Act, 1888. In the said notice, it was alleged that the Appellant has carried out unauthorised construction of

a shed of brick masonary walls and A.C. Sheet roof admeasuring 23’ X 14’ 6". Reply was given by the Appellant to the said notice on 17th January 1991, stating that there was a zavli construction (i.e. construction made by using dry coconut tree leaves) in 1961-62 and some time in the year 1970 the same was repaired and made of brick masonary walls and A.C.sheet roofs. The learned Trial Judge while dismissing the suit held that the Appellant has failed to prove that suit structure is authorised.

4. The learned Counsel appearing for the Appellant submitted that in the interim order dated 13th February 1991 passed by the Trial Court, policy of the Respondent - Corporation to regularise such constructions subject to payment of penalty has been referred to and the case of the Appellant is not considered by the Authority under the said policy. He submitted that in the suit written statement was not filed and the evidence not led by the Respondent and therefore, a decree ought to have been passed in favour of the Appellant. He submitted that there are similar structures in the area and the Respondent - Corporation has not taken any action. The learned Counsel appearing for the Respondent supported the

impugned Judgment and Decree.

5. In response to notice under Section 351 of the said Act of 1888, the Appellant replied stating that in 1970 the suit structure was repaired with brick walls and A.C. sheet roof. The only witness examined by the Appellant stated in the cross examination that he was born in the year 1965. In examination in chief and in particular in paragraph no.3 thereof, he stated as under :-

> " Plaintiff has been paying the Municipal taxes in respect of suit premises. I am producing the tax bill for the year 1980-81. It is given Ex.C. Initially suit structure was a hut. It was a Zavali huts (made of coconut leaves). Thereafter, if was converted into Pakka Structure, in the year 1970. The land below the structure is owned by; off. The land bears the Survey No.20, and Hisa No.30. I am producing the 7/12 extract dated 25.7.1989. It is given Ex.'D'."

6. Thus, it is apparent that instead of original hut made up of coconut leaves which was in existence earlier, a brick structure was made by constructing brick walls and A.C. sheet roof. It is not the case of the Appellant that the said work was carried out after obtaining permission of the Respondent.

7. The Respondent may not have filed written statement. The burden was on the Appellant to prove

that either structure was made after obtaining valid permission or the structure was protected by any policy of the Respondent - corporation. Surely this cannot be a construction which can be said to be authorised. The Appellant could not produce on record any policy which protects the structure.

8. Relief of declaration and perpetual injunction under the Specific Relief Act, 1963 is always discretionary and equitable. If declaration and injunction is sought in respect of an unauthorised construction, discretionary and equitable relief can not be extended to the Plaintiff to protect such a structure.

9. There is no error in the view taken by the Trial Court. There is no merit on the Appeal and the same is dismissed.

10. Notwithstanding the dismissal of the Appeal, considering the fact that the structure is in existence from the year 1970, it will be open for the

Appellant to apply to the Competent Authority of the Respondent - Corporation for regularisation of the suit structure. Considering the facts and circumstances of the case, parties are directed to maintain status-quo in respect of the suit structure as on today for a period of 16 weeks from today.

Parties to act on an authenticaed copy of this order.

JUDGE